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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 832

STEFANOS KTISTAKIS,
Petitioner,

vs.

UNITED CROSS NAVIGATION CORP. and CARRAS (U.S.A.) LTD.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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The applicability of the defenses of assumption of risk and contributory negligence in a breach of warranty of seaworthiness claim is one of the substantial questions meriting this court's review and clarification.

Respondent's brief in opposition to the petition indulges in poetic license without any justification in fact.

Contrary to respondent's statement in its brief, the fact is that petitioner alleged error in the court below in respect to the trial court's treatment of the question of contributory negligence and assumption of risk on the facts in the case.

This court has stated in unequivocal terms that our courts are not concerned with form—only with substance. *Holmes v. Pope et Talbot*, 346 U. S. 406.

In the cases cited in respondent's brief in opposition to the petition, the parties had not raised the questions raised in the petition herein regarding the availability of the tort defense of contributory negligence to bar the claim or to mitigate damages.

This question has been decided in relation to indemnity in stevedoring contracts (*Ryan Atlantic* v. *Ryan*, 349 U. S. 901), but never as to indemnity to seamen for breach of warranty.

This question is of basic and substantial importance in the entire field of maritime jurisprudence.

The said cases, therefore, are neither authority nor precedent for or against the ruling now sought by petitioner.

Petitioner doesn't question or dispute that, till now, contributory negligence has been applied to diminish damages.

However, a custom long continued is not immune from attack.

Petitioner now attacks the practice as applying a tort standard to a contract cause of action, breach of warranty.

This has been held inappropriate by this court in *The Atlantic* v. *Ryan*, 349 U. S. 901, and, more recently, in *Italia* v. *Oregon* (decided March 9, 1964), —— U. S. ——.

In *Italia*, *supra*, this court said:

> "The shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended . . ." (Footnote 3)

and, at p. 5 of slipsheet:

> "In the area of contractual indemnity, an application of the theories of active or passive negligence as well as primary or secondary negligence is inappropriate." *Weyerhaeuser, supra*, at 569."

and, at p. 9 of the slipsheet:

> "They also serve to render a tort standard of negligence inapplicable to the stevedore's liability under its warranty of workmanlike service."

Wherefore petitioner respectfully prays that the petition herein be granted.

Respectfully submitted.

JACOB RASSNER,
Counsel for Petitioner.